THE TREATY-MAKING POWER

BY STUART H. PERRY

All provisions which require more than the majority of any body to its resolutions have a direct tendency to embarrass the operations of the Government, and an indirect one to subject the sense of the majority to that of the minority.—Alexander Hamilton in *The Federalist.*

THE course of the Senate in disposing of the Four Power treaty confirms the conclusion drawn from its treatment of the Versailles treaty, that the requirement of a two-thirds vote combined with the normal operation of party politics has impaired the treaty-making power of this country to a dangerous degree. In the former case there was a complete breakdown of the mechanism for making international arrangements; in the latter case its operation was precarious, the outcome was due to good luck, and the inherent fault of the system is left even more apparent than before. Owing to changes in our political make-up and habits, a rule that was designed to insure an unprejudiced consideration of treaties has been nullified as to its primary object; while in practice it has weakened our hand in dealing with foreign Powers and has made the results of our diplomacy uncertain. Its effects are depressing to true statesmanship and react harmfully both on the attitude of the people toward foreign affairs and on the prestige of the nation.

With respect to the ratification of treaties we are out of step with the rest of the world, not in principle but in our peculiar form of practice. The necessity of ratifying important treaties has long been accepted. In the days of absolute government, although the envoy usually represented his prince under a "full power" and ratification was hardly more than a formality, it still was necessary as a safeguard in case the envoy should have exceeded his authority. The practice has continued under representative governments for an analogous reason, because it

is an assurance that the transaction actually meets the approval of the political body from which the executive's authority is derived. Thus in most countries having a parliamentary form of government the approval of the parliament is required, at least for the most important treaties, notwithstanding they are negotiated by a responsible ministry deriving its powers from the parliament. In our own case the divergence in practice lies partly in the fact that the Executive is not responsible to the Senate in the usual parliamentary sense, but chiefly in the requirement that all treaties shall be ratified by a two-thirds vote.

The motive that prompted the insertion of this provision in the Constitution was primarily not to insure that the merits of treaties should be decisively approved, as might be surmised, but to appease a demand arising out of the suspicions and jealousies of the States. The seven smaller States of the original thirteen, though a majority of the whole number, contained only one-third the total population of the country. Therefore, lest the majority of the people might be dominated by a minority, the Articles of Confederation provided that no treaty might be made without the assent of nine States. The two-thirds rule in the Constitution of 1789 merely reflected this demand, which was so insistent that it had to be complied with regardless of the intrinsic merits of the rule.

In this connection it is a significant fact that Alexander Hamilton, in his brilliant analysis of the Constitution in the *Federalist* papers, nowhere asserts the intrinsic desirability of a prescribed majority for the ratification of treaties, or for any other purpose. In fact his inclination, on general principles, was distinctly the other way, as is shown by the pregnant sentence quoted at the beginning of this article. He discusses at length the provisions as to the treaty-making power, but his only argument as to the two-thirds rule is to defend the requirement for approval by two-thirds of the Senators present, instead of the more drastic requirement of two-thirds of the entire Senate membership, which had been suggested.

This jealous particularist sentiment, which dictated the rule and dominated the entire discussion of it, long ago disappeared. The country has become unified to a degree that could hardly be

imagined in those days. The rise of party government has obliterated sectional lines, and the danger of a group of small States dominating the large ones has disappeared with the increase in their number and the diffusion of population. In short, the prime reason for the rule is dead; yet the rule itself still lives to embarrass the nation in the affairs of its maturity.

Incidentally the original advocates of this clause argued that it would assure dispassionate consideration of treaties upon their merits, by a body distinct from the Executive, whose members were to be chosen upon a plan calculated to produce an aristocracy of genuine statesmanship. But that part of the design has failed also, just as the design of an Electoral College failed, and for the same reason. With the rise of the party system, President and Senate alike have become directly responsible to the voters, all alike hold office as party representatives, and the President himself is the active head of the dominant party and as such exercises a strong though somewhat uncertain political leadership in both houses of Congress. Thus the Senate has become a body entirely different in character from what the authors of the Constitution contemplated, its relations with the Executive are different, and the consideration of treaties instead of being a dispassionate inquiry has become a matter subservient to party policy, differing little in character from the debates over legislative matters.

This result was reached clearly and beyond all question in the two great treaty controversies of the last three years. The tendency in that direction was observable much earlier; for example in the vote by which the treaty of arbitration with Great Britain was rejected in 1897, when 77 per cent of the Republican votes were cast for ratification and 57 per cent of the Democratic votes were cast against it. But not until the Versailles treaty was submitted did the ratification of a treaty become strictly a political issue, with the full power of the Administration working for it through the machinery of the dominant party in the Senate, and all the resources of the Opposition arrayed against it.

The results expressed in percentages are highly significant. Thus on the first test vote on November 19, 1919, when the question was on the ratification of the treaty with reservations,

out of 48 Republican Senators voting, 35, or 73 per cent, supported the resolution, while out of 46 Democrats voting, 42, or 91 per cent, opposed it. On the final vote the same day, when the question was on the ratification of the treaty without change, 37 out of 44 Democrats, or 84 per cent, voted yes, while 46 out of 47 Republicans, or 98 per cent, voted no.

Again on March 19, 1920, when the final vote was taken on the question of ratification with the Lodge amendments, 28 Republicans out of 40, or 70 per cent, followed the leadership of their party. Even this percentage, however, does not reflect the strength of their party attitude, for the other 12 Republicans who voted against ratification were "irreconcilables" who had previously opposed the treaty either with or without reservations. The real attitude of the Republican members of the Senate, therefore, remained unchanged, being about 98 per cent against the Administration. The attitude of the Democrats was equally unchanged in principle, though the group of seven who had opposed unqualified ratification in November, and who now voted for the treaty with reservations, was augmented by 14 others who were willing to accept reservations rather than let the treaty fail. The percentage of Democratic votes on this occasion is not instructive, because many of them were cast against the treaty by strong Administration supporters who had rather the treaty would fail than accept any modification.

In the case of the Four Power treaty the same tendency was equally conspicuous. Taking the average of all the roll calls on amendments and reservations, about 92 per cent of all Republican votes were cast against such changes and about 76 per cent of all Democratic votes in favor of them. The Republican percentage never fell below 90 and in some cases the Democratic percentage reached 91. On the final vote 55 out of 59 Republicans, or 94 per cent, voted for ratification, while 23 out of 35 Democrats, or 66 per cent, opposed it. It is also worthy of note that this ratio of party solidarity among the Democrats was attained in spite of the fact that Senator Underwood's activity in the negotiation of the treaty might have been expected to influence the attitude of his party colleagues in its favor. There is every reason to expect that the parliamentary history of these treaties will be

repeated whenever a treaty is submitted that is important enough to be made a party issue, or which is brought forward under circumstances that arouse party opposition.

The result is that no Administration can feel even reasonably sure of its ground in negotiating an important treaty unless it can rely upon a strong party majority in the Senate. That majority, to be effective, must be much larger than an Executive would require in any other country having a parliamentary form of government. Where, as in other countries, a majority vote in parliament is sufficient for all purposes, a safe "working majority" is all that the Executive needs; here he must be able to count upon sufficient party strength in the Senate to insure a majority of two to one upon a treaty question. He can, it is true, count upon converting a few members of the Opposition, upon the merits of the case; but experience has proved that the number of such converts is small, and furthermore they are likely to be offset by a certain number of defections from the Administration ranks. Therefore, in order to insure the two-thirds majority required by the Constitution for the ratification of treaties, his party strength in the Senate must be measured by approximately the same ratio.

This feature of our treaty-making machinery clearly puts the United States at a disadvantage as compared with other nations, for it reduces our diplomatic actions in important cases, no matter how formal and definitive they may purport to be, to the status of preliminary conversations. A nation's diplomatic efficiency is measured by the promptness and certainty of its action. Obviously an autocratic government is most efficient, as far as the technique of diplomacy is concerned, because the functions of negotiation and of ratification are combined in one political body; the envoy's "full power" therefore is worth its face value, he speaks for his prince, and ratification of his acts is practically assured. The diplomatic efficiency of an ordinary parliamentary government, acting through responsible ministers whose power is derived from a parliamentary majority, approximates that of the old-time monarchy; because a ministry cannot exist unless it commands such a majority, and as long as it does exist its actions are reasonably sure of ratification, the same working majority being sufficient for either end.

In the case of the United States, however, the Constitution, as modified by political custom, requires a party majority much larger than any Administration can ordinarily hope to enjoy, and if that margin of party strength is lacking, the Administration's position in the conduct of foreign affairs becomes insecure. Moreover this two-thirds rule is more onerous to the Administration that even the same requirement would be to the executive power in a European state, because in the latter case the fact that the Executive derives his powers from a parliamentary majority insures much closer political harmony than exists between our Senate and President. The relation between these two is only a liaison, between branches of government that in most respects are independent of each other, which is maintained only through personal influence, the use of patronage and a common party allegiance. All of these three may fail; personal influence may be replaced by antipathy, and of course patronage and a common party allegiance avail only among Senators of the President's own party, who may be only a small majority or even a minority.

Since it has become clear that the Senate may be expected to deal with treaties according to party lines, it is a logical necessity that the required majority for ratification should be reduced enough to make the rule practical and workable under ordinary political conditions. To make it obligatory for an Administration to command a two-thirds vote upon a treaty—which in effect means a party majority of 32—is to impose a condition that cannot often be met. In the last forty years no Administration has enjoyed such a party backing, and only in two Congresses during that period—the Sixtieth and the Sixty-first—did the Administration's majority even approximate that figure. If the requirement were reduced to three-fifths or 60 per cent, instead of 66.6 per cent, it would be much more workable. A President strong politically might fairly hope to have a Senate standing 58 to 38 in his favor; yet even that hope has been realized in only four Congresses in the 22 that have sat since 1880. From 1880 to 1899 no party majority in the Senate has exceeded 10. A requirement of 55 per cent, or 53 to 43, might seem low, yet it would in practice call for a party majority of approximately 10; and in any

case it would be enough to insure a reasonably strong preponderance of opinion in a chamber of only 96 members.

Any proposal to reduce the minimum for ratification naturally evokes the objection that an international agreement is a matter of such gravity that it ought to be approved upon its merits by an ample majority. But the answer is twofold: first, that such matters patently are no longer decided upon their merits; and second, that whatever the theoretical value of the rule is, or may have been, it has become practically unworkable and leads to deadlock and inaction.

In the light of the votes and percentages already referred to, it is idle to attempt to maintain the fiction of nonpartisan consideration of treaties. This is reflected in the small ratio of defections from party alignment. Thus in the final vote of November 19, 1919, which was the clearest test of party attitude, only one Republican and seven Democrats were out of step with their respective parties. In the case of the Four Power treaty the vote on the first reservation showed only five Republicans and three Democrats out of step, and on the final vote only four Republicans and 12 Democrats.

In the case of both treaties party strength determined the outcome. Whatever the faults of President Wilson's treaty may have been, the primary cause of its rejection was the fact that the political opposition was strong enough to block it. On the other hand, with all the merits of the Four Power treaty, and notwithstanding the exceptionally large party majority of 59 to 35 in the Senate, the Administration barely succeeded in obtaining ratification.

It is only fair to concede that a certain proportion of both Republicans and Democrats who apparently followed party leadership judged these treaties upon their merits and would have voted the same way had they belonged to the opposing parties. But, paradoxical as it might appear, this fact would in no wise abate the necessity of a two-thirds party majority in order to insure a two-thirds treaty majority, as long as any considerable number of Senators regard a treaty as a party issue; because the unprejudiced or nonpartisan votes presumably would come proportionately from both sides of the chamber.

For example, suppose a treaty comes as a Republican party issue before a Senate made up of 64 Republicans and 32 Democrats. If all voted as partisans there would be a two-thirds majority for ratification. But suppose half the members on each side ignored politics and weighed the treaty on its merits. Even though these men approved the treaty on its merits by a two-thirds vote, or 32 to 16, still 32 more votes would have to come from the ranks of the 48 partisan Senators in order to ratify the treaty. In the same manner if 60 Senators voting as non-partisans stood two to one for ratification, the Administration would still have to get 24 out of the other 36 partisan Senators; otherwise the treaty would fail, though approved on its merits by a two-to-one majority of unprejudiced votes. In other words, whatever the number of partisan votes may be, the President must control two-thirds of them; otherwise the minority of unprejudiced opinions will prevail over the majority. Even though 90 members, considering a treaty judicially, approved it by a vote of 60 to 30, three hostile partisan votes out of the remaining six would defeat ratification. The existing rule therefore enables a few partisan Senators to nullify the will of a large majority of the whole body.

The settled political practice of dealing with treaties as matters of party policy, coupled with the two-thirds rule, has shown its results so clearly that any further demonstration would be superfluous. We may accept as a fact henceforth that it is impossible for the American Government to do business as effectively as other nations in any matter involving an important treaty. Inasmuch as one Administration cannot bind its successor by any commitment or statement of policy, it is clear that no international engagements can be undertaken except through the medium of treaties; and it has now become equally clear that the fate of such treaties is altogether precarious. Therefore our Government is left incapable of making a tentative agreement that embodies even a fair prospect of finality. Diplomatic communications become merely individual expressions of officials, binding only while they remain in office, and to be relied upon only so far as the Administration is able to carry them out independently of the Senate. International conferences in

which we take part become mere preliminary *pour-parlers*, which may or may not lead to definitive agreements, the issue depending on the ebb and flow of domestic politics. Our representatives in such conferences are not in any sense plenipotentiaries and their "full powers" are a mere form, for their proposals, acceptances and commitments carry with them only a possibility of confirmation. Obviously such a spokesman is at a disadvantage in dealing with one whose acts are virtually binding *ab initio* and which are practically certain to be ratified.

Such uncertainty not only impairs the efficiency of our diplomatic practice, but impairs the country's prestige in the councils of the nations. The nation is placed in the position of an individual who cannot even himself be sure that he means what he says or that he can perform what he undertakes. The reaction upon our own statecraft is hardly less pernicious. It cannot fail to dishearten an able diplomat to see his best work undone, despite its acknowledged merits, through the operation of an obsolete and unreasonable rule, and the effect upon public opinion must inevitably be confusing and demoralizing.

It is not necessarily an evil thing that the disposition of treaties has become a matter of party politics. It seems inevitable that our Government must be carried on under the party system, and it is to be expected that foreign relations not only will tend increasingly to become party issues, but that they will become increasingly important as such. The evil lies in the fact that we do not permit such issues to be disposed of according to the logical and workable methods whereby all other political issues are disposed of, but have placed them in a parliamentary straitjacket that prevents normal action and which is likely to result in deadlock unless the Administration happens to possess abnormal political strength. We look to the dominant party, represented by the President and a majority in the houses of Congress, to reflect public sentiment and execute the will of the majority, and we hold it responsible for its action both in foreign and domestic affairs. Let us, then, provide a reasonable mechanism through which that responsibility can be discharged.

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